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DEC 8

CHARLES

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 137

MATSON NAVIGATION COMPANY, A CORPORATION, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

SUPPLEMENTAL BRIEF OF PETITIONER.

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SUPPLEMENTAL BRIEF OF PETITIONER.

The respondent has not denied that the Court of Claims erroneously held that it was deprived of jurisdiction of this cause by Section 154 of the Judicial Code. But the respondent has urged that the Court of Claims should have dismissed the suit upon the ground that the petitioner's exclusive remedy was in the District Court under the Suits in Admiralty Act.

The Court of Claims did not decide this question or comment upon it in its opinion (R., 37-40). No findings upon this subject were made although evi-

dence pertinent to this question was introduced before the Court of Claims. A complete record would enable petitioner to more fully and completely answer the respondent, but even the incomplete record will establish that petitioner's cause of action does not lie in the District Court under the Suits in Admiralty Act.

Statement of Facts Material to the Question Presented.

The petition which the Court of Claims dismissed was based upon the balance of an open, current and mutual account between the Matson Navigation Company (which we will refer to as the "shipowner") and the United States (R., 10-13). This account arose out of the following facts;

Pursuant to the Act of June 15, 1917, (40 Stats. 182, *infra* p. 51) the United States, acting through the United States Shipping Board (which we will refer to as the "Board"), requisitioned seven of the shipowner's vessels for use by the Government (R., 8). On December 29, 1917, the United States and the shipowner entered into agreements called "requisition charters" which fixed the compensation to be paid for use of the requisitioned ships (R., 8), consisting of a monthly rate to be fixed by the Board (R., 20), supplemented by the amount of any increased wages and bonuses over the standard prevailing August 1, 1917, paid by the shipowner to masters, officers and crews of the vessels (R., 20, 21).

Pursuant to contracts entered into between the United States and the shipowner, the latter agreed to manage and operate certain other vessels (R., 9, 10)

for which the shipowner was to receive compensation at rates to be fixed by the Board (R., 10).

All items of compensation becoming due to the shipowner and the United States under all of these agreements as well as all items of revenue received by the shipowner for the account of the Government were carried in a single current, mutual and running account by and with the knowledge, consent and understanding of the Government (R., 10, 11).

Negotiations for the settlement of the account culminated in an agreement entered into between the Board and the shipowner on October 18, 1926 (R., 12), whereby this account and all matters connected with the requisitioning of the shipowner's vessels and with the management and operation of the Government's vessels were settled and liquidated by payment to the shipowner of a lump sum of $134,722.67 on account of the balance due the shipowner, reserving however to the shipowner its claim to an additional balance of $49,373.11, consisting of the amount of additional wages and bonuses paid to the crews of requisitioned vessels (R., 31-33).

This suit was brought to recover the balance claimed (R., 14) on April 6, 1927 (R., 7). A motion to dismiss was filed on January 13, 1930, more than two years after commencement of the action (R., 35).

Summary of Argument

The respondent urges that the Suits in Admiralty Act afforded Matson Navigation Company (hereinafter called the "shipowner") a remedy for the lia-

bility described in its petition and that, under the authority of *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320, remedy is exclusive and deprives the Court of Claims of jurisdiction of the cause.

The shipowner asserts that its cause does not lie under the Suits in Admiralty Act, for the following reasons:

(1) The Suits in Admiralty Act admittedly affords a remedy in the District Court only upon a cause of action within the admiralty or maritime jurisdiction, and the present cause is non-maritime in its nature, even if the action is based upon "requisition charters" because these agreements are non-maritime.

(2) The action is upon the balance of a current, mutual and running account, and hence is a non-maritime cause for which the Suits in Admiralty Act affords no remedy.

(3) Besides being non-maritime, the cause otherwise lacks the essentials of a suit under the Suits in Admiralty Act.

(4) The shipowner's remedy lies not under the Suits in Admiralty Act but under the Merchant Marine Act of 1920.

(5) The Government's Construction of the Suits in Admiralty Act would lead to confusion and uncertainty.

(6) The jurisdiction of the Courts of Law in such cases is supported by a long course of decisions.

Statutes Involved.

The statutes upon which the petitioner will principally rely are printed in the appendix, *infra*, pp. 50-58.

ARGUMENT.

I. The Suits in Admiralty Act affords a remedy only upon a maritime cause and the agreements upon which the respondent assumes that this suit is based are non-maritime in their nature.

(a) *The Suits in Admiralty Act Refers Only to a Cause in Admiralty.*

Section 2 of the Suits in Admiralty Act (41 Stats. 525, U. S. C. Title 46, Sec. 862, *infra* p. 56), which grants to certain suitors the right to maintain a libel *in personam* against the United States, restricts that remedy to "cases where if such vessel were privately owned and operated * * * a proceeding in admiralty could be maintained. * * *" This limitation has been recognized in the decisions of this court. *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, supra; *United States Shipping Board Emergency Fleet Corporation* v. *Rosenberg Bros. & Co.*, 276 U. S. 202.

(b) *The Agreements Upon Which Respondent Claims That This Proceeding is Based Are Non-maritime.*

The Government having assumed that the shipowner's claim is based upon the "requisition charters," asserts that these are maritime contracts and illus-

trates its claim by authorities which involved contracts essentially maritime in nature. In reality, the cause is based not upon these agreements but upon the balance of certain accounts. However, the "requisition charters" are, in fact, non-maritime, and can not therefore be the subject of a suit under the Suits in Admiralty Act.

The Nature of the Agreements.

It was after the shipowner's vessels had been requisitioned by, and received into, the possession of the United States that the United States presented to the shipowner certain agreements, all in the same form and each entitled "requisition charter." One such agreement was executed by the United States and the shipowner for each vessel (R., 8, 9).

At the time that the so-called "requisition charters" were executed the vessels were in the possession of the United States under requisition. The vessels were not redelivered to the shipowner before or at the time that the requisition charters were entered into (R., 9).

The so-called "requisition charter" did not confer possession on the United States. The United States continued to hold and use the vessels under the requisition which had theretofore been made. Upon this matter the agreements left no doubt. The first recital in the agreements was:

> "* * * by Requisition Order, dated —— —, 1917, pursuant to the Urgent Deficiency Act, 15 June, 1917, and the President's Executive Order 11 July, 1917, the United States has requisitioned the use of the Steamship ——,

> and the Steamship has been delivered into the possession of the United States pursuant to the Requisition;" (R., 15, 16).

They also provided:

> "The steamship shall remain in the service of the United States under the Requisition Order to be employed as and where the United States may from time to time determine and for such period of time as the United States may determine * * *" (R., 17).

Furthermore, the ship is referred to in each agreement as "the requisitioned vessel" (R., 18).

The agreement was subject to termination by the United States (R., 16) and, under certain circumstances, by the shipowner (R., 20); in fact, the agreement did not bind the Government to any specified rate of compensation and, being illusory, was subject to termination by either party. But had the agreement been terminated, the shipowner would not have been entitled to return of the vessel (R., 17). It would have been relegated, in that case, to its statutory right to proceed at law for the recovery of the as yet undetermined just compensation to which it was entitled.

Thus, the Government acquired and retained the possession and control of each vessel, not by virtue of the agreement, but in the exercise of its power of eminent domain.

Immediately upon the requisition and seizure of the shipowner's vessels the United States became obligated, under the provisions of the Urgent Deficiencies Appropriations Act of 1917 (40 Stats. 182, *infra*, p. 51)

and the Fifth Amendment to the Constitution to pay to the shipowner just compensation for use of the vessels. Under the Act, it was the duty of the President to determine this just compensation. If the compensation so determined did not satisfy the shipowner it was the President's duty to pay to the shipowner seventy-five per cent of the amount so fixed and it was the shipowner's right and privilege to maintain an action for such additional sum as would be necessary to afford the shipowner the just compensation to which it was entitled.

The object and purpose of these agreements was to fix the just compensation for use of the vessels while under requisition to the satisfaction of the shipowner and thus to avoid the necessity of judicial proceedings for that purpose. This purpose is best described in the recital of the agreement that—

> "Whereas, it is desired by the United States and by the owner to fix the compensation (hereinafter called hire) which the United States shall pay to the owner for the use of the Steamship so requisitioned, and to define by agreement the rights and duties of the United States and of the owner with respect to the operation of the vessel under the Requisition and with respect to other matters in connection therewith" (R., 16).

The second paragraph of the agreement accomplishes the purpose stated in the recital by the following provision:

> "In consideration of the compensation provided and the other obligations assumed by the

> United States hereunder, the owner accepts this requisition charter in full satisfaction of any and all claims he has or may have against the United States arising out of the Requisition and accepts the compensation herein provided for as the just compensation required by law" (R., 16).

This just compensation, the measure for which was prescribed by the agreement, was to continue only so long as the vessel was retained by the United States under requisition (R., 20).

All of the remaining provisions in the so-called requisition charter relate in one way or another to this purpose.

In determining just compensation, it was but natural that the Government should resort to current rates then being paid for vessels under charter. Certain provisions of the "requisition charter" were fashioned after clauses frequently found in charter-parties. This was done for convenience so that current charter rates might be resorted to by the United States in fixing just compensation while the vessels were in its possession.

The United States might have operated the vessels itself or if might have used the services of the shipowner for that purpose. To govern the former contingency a so-called "time form" was attached to the agreement and to govern the latter contingency a so-called "bare boat form" was attached (R., 16).

Among the provisions inserted in the time form for the purpose of assimilating the just compensation to current charter rates, was one requiring the shipowner to pay the wages of officers and crew. The just compensation under the time form was affected, among other things, by the standard of wages prevailing at that time. Therefore, to the extent that wages might subsequently be increased, the compensation would become correspondingly inadequate, and for that reason, each agreement provided that in addition to the basic compensation to be paid to the owner measured by the rate per ton fixed by the board, the owner should receive an amount equal to all increased wages and bonuses over the scale prevailing August 1, 1917, paid by the owner to the officers and crew of the vessel (R., 21).

It is apparent that the so-called "requisition charter" was neither a requisition nor a charter. It was not a requisition because the requisition had been completed on October 15, 1917, and the vessels were not surrendered to the shipowner for approximately two years thereafter (R., 9). The agreements provided specifically that the vessels should continue under the requisition theretofore made (R., 17).

Neither was the so-called "requisition charter" a charter in any sense.

> "A charter party is defined to be a contract by which a ship, or some principal part thereof, is let to a merchant, for the conveyance of

goods on a determined voyage to one or more places."

Ward v. *Thompson,* 22 How. 330;
Abbott, Shipping, Sec. 241;
Vandewater v. *Mills,* 19 How. 82.

The vessel was not hired or let by the requisition charter. In the first place, it had already been requisitioned and seized and the contract merely affirmed the requisition; and, in the second place, the ship was in the possession of the sovereign power, not for the conveyance of goods, but for any purpose which the Government might choose.

As has already been said, the true purpose of the agreement was to accomplish the desire of the United States and the owner—

> "to fix the compensation * * * which the United States shall pay to the owner for the use of the vessel so requisitioned" (R., 16).

The respondent incorrectly states, therefore, that the contracts related "solely to the operation of ships upon navigable waters" and it incorrectly refers to the suit as one for "hire" fixed by charters. The word "hire" is specifically defined in the "requisition charter" as just compensation for use of the requisitioned vessel (R., 16). The subject of the contract was solely the compensation incident to the exercise by the Government of the power of eminent domain, not a subject of suit between private parties in admiralty.

Such Agreements Are Non-maritime.

The exercise by the United States of its power of eminent domain is not a subject of Admiralty juris-

diction, whether the act relates to a ship or to any other species of property. An owner may recover just compensation by judicial proceedings, but not in a Court of Admiralty; a claim for just compensation is founded upon the Constitution and is therefore within the jurisdiction of the Court of Claims.

Phelps v. *United States,* 271 U. S. 341, 343.

This is true even if the property taken happens to be a ship and Courts of Law have assumed jurisdiction of proceedings to recover just compensation for the use of ships.

Luckenbach Steamship Co. v. *United States,* 272 U. S. 533;

Gulf Refining Co. v. *United States,* 58 Ct. Cl. 559.

The respondent apparently relies upon the fact that a so-called "requisition charter" relates to a ship, but much more than the fact that a ship is concerned is necessary to render a contract maritime in nature. A contract for the sale of a ship (*The Eclipse,* 135 U. S. 599), an agreement to construct a ship (*Edwards* v. *Elliott,* 21 Wall. 532), and a ship mortgage (*J. E. Rumbell,* 148 U. S. 1) all relate to ships in some manner, but are non-maritime. All other contracts which pertain to ships or cargoes but which do not directly relate to the carriage of goods or the navigation of ships are non-maritime. *The Thames,* 10 Fed. 848 (D. C. N. Y., 1881); *Richards* v. *Hogarth,* 94 Fed. 685 (D. C. N. J., 1899); *Norton* v. *The Richard Winslow,* 71 Fed. 426 (C. C. A., 7, 1896). The requisition and seizure of a ship by the Government does not relate to the

ship's navigation or the carriage of cargoes; it is wholly preliminary to any use of the ship by the Government and the duty to pay just compensation is based upon the Constitution, not upon any maritime principle.

A contract having for its subject just compensation is no more a proper foundation for the exercise of admiralty jurisdiction than is the question of just compensation itself. The mere fact that just compensation is fixed in one instance by agreement and in the other without agreement affords no ground for distinction, and, if such an agreement also specifies the conditions under which just compensation fixed therein is acceptable to the shipowner, it is none the less non-maritime. The subject of such an agreement is the ascertainment and payment of just compensation and the ascertainment and payment of just compensation is "a necessary condition of the taking". *Seaboard Air Line Railway Co.* v. *United States*, 261 U. S. 299, 304.

These requisition charters by recital and express provision expressed their sole purpose, to wit, to satisfy all claims arising out of the requisition and to determine the compensation required by law (see Section 2 of Agreements); and all of the provisions in the contracts are directed solely to this end or to defining the conditions upon which the compensation so fixed was acceptable to the shipowner.

It is quite true, as respondent asserts, that the shipowner's right to recover is measured by the agreements but it is also true that it is the right to just compensation which is so measured. This action to the extent that it is based upon the agreements is one to

recover just compensation even though the parties have provided a yardstick for its measurement.

Cases cited by the respondent upon this subject merely hold that the just compensation to which the shipowner is entitled, having been defined by agreement, does not include interest unless interest is provided for in the agreement; but these very cases recognize that it is just compensation which is so limited by contract, a just compensation which does not include interest unless the agreement so provides. Indeed, interest is never allowed against the Government except in condemnation proceedings. Even where property is taken for a public use without proceedings in condemnation and a promise is implied on the part of the United States to pay just compensation, interest is not payable (*United States* v. *North American Trading and Transportation Co.*, 253 U. S. 330). Nevertheless, even in such a case, where the action is upon implied contract, the nature and subject matter of the contract is the payment of just compensation.

> "In that view, we are of the opinion that the United States, having by its agents, proceeding under the authority of an Act of Congress, taken the property of the claimant for public use, is under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation where property * * * is taken pursuant to an Act of Congress, as private property to be applied for public uses."
>
> *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645, 649.

And so, in this action, which is not in condemnation, but to recover just compensation fixed by express contract, interest is not payable because not provided for. But this express contract relates even more directly than the implied contract referred to in *United States* v. *Great Falls Manufacturing Co.*, to the "obligation, imposed by the Constitution, to make compensation." "Requisition charters" have been considered and declared to be contracts merely liquidating the just compensation to which the shipowner was entitled as the result of a lawful seizure.

Huron Navigation Co. v. *United States*, 60 Ct. Cl. 770 (1925);

Atlantic Refining Co. v. *United States*, 69 Ct. Cl. 713 (1930);

Luckenbach Steamship Co. v. *United States*, 299 Fed. 876 (S. D. N. Y. 1924).

In the case last cited, the court said:

> "Thus it appears that the just compensation of the Statute was fixed by agreement."

The "requisition charters" deal with the non-maritime subject of just compensation and the shipowner has, therefore, no remedy under the Suits in Admiralty Act. Its sole remedy is at law under the Tucker Act.

(c) *Even if the Requisition Charters Contained Provisions Maritime in Their Nature, Admiralty Would Not Have Jurisdiction.*

We have said that certain clauses are found in the so-called requisition charters which are sometimes

found in true charters, but the mere presence of such provisions could not confer jurisdiction upon admiralty. The provisions relating to the requisition and just compensation are their essence. If any provision could be found which might properly be said when taken by itself, to be maritime in nature, it would nevertheless remain a provision purely subordinate and incidental to the essential non-maritime nature and purpose of these agreements.

But, let us assume for argument's sake that there are provisions which are not purely incidental to this purpose, but which might even be conceived to be foreign to this purpose, nevertheless, all stipulations in these "requisition charters" are mutually dependent one upon another. These "requisition charters" fix but one compensation designated in the agreements as "just compensation." If this just compensation does in fact recompense the shipowner for services which might be termed maritime, as well as for the use of the ship, the compensation is not susceptible of separation into its component parts.

Even if the respondent could find among the clauses expressing the conditions upon which the compensation is acceptable, provisions which, standing alone, might be regarded as maritime in their nature, jurisdiction would not thereby be conferred upon admiralty, for admiralty is without jurisdiction of contracts which are part maritime and part non-maritime. *Norton* v. *The Richard Winslow,* 71 Fed. 426 (C. C. A. 7, 1896).

It is for this reason that the charter of a vessel to be used as a mariner's school is non-maritime.

"It is not enough that the contract includes a maritime adventure among its objects, or that it was to be performed at sea. Unless it was purely maritime, it was not one of which a court of admiralty has jurisdiction. In the language of Justice Clifford, in *The Belfast,* 7 Wall. 637 (19 L. Ed. 266):

" 'Contracts, claims or services, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts.'

"Contracts of a mixed nature are not cognizable in these courts, and that there is a sufficient reason for this is well illustrated by the present case. Here is the ordinary contract between school proprietors and patrons, with the further provisions that the school is to be located on shipboard, and the course of instruction is to include a foreign voyage and studies in nautical and naval matters. Combined with the provisions of a common-law obligation are some that may relate to maritime services. How can a court of admiralty separate the liabilities and apportion the damages arising from the breach of the maritime part of the contract? Whenever the principal subject-matter of a controversy belongs to the jurisdiction of a court of common law, or of equity, the incidental matters must also be relegated to the appropriate jurisdiction, notwithstanding of themselves they might be cognizable in admiralty. *Kellum* v. *Emerson,* 2 Curt. 79, Fed. Cas. No. 7,669; *Grant* v. *Poillon,* 20 How. 162, 15 L. Ed. 871; *Minturn* v. *Maynard,* 17 How. 477, 15 L. Ed. 235; *Hall* v.

Hudson, 2 Sprague, 65, Fed. Case, No. 5,935; *Vandewater* v. *Mills,* 19 How. 82, 15 L. Ed. 554."
The Pennsylvania, 154 Fed: 9 (C. C. A. 7, 1907).

Upon this subject the authorities are in complete agreement. *Norton* v. *The Richard Winslow, supra; Pacific Coast Steamship Co.* v. *Ferguson,* 76 Fed. 993 (C. C. A., 9, 1896); *The Ada,* 250 Fed. 194 (C. C. A., 2, 1918); *The Virginia,* 1 Fed. Cas. 306 (No. 141); *Graham* v. *Oregon R. & N. Co.,* 134 Fed. 454 (D. C. N. Y., 1904). It is obvious, to say the least, that the "requisition charters" are predominantly civil in their nature and that the various provisions of each are dependent one upon another.

Clause Tenth of the "Requisition Charters", which the Government asserts is the subject of dispute in this action, together with clause Eighth fixed the standard not of "hire", as respondent states, but of "just compensation" and are peculiarly non-maritime.

(d) *However Much the So-called "Requisition Charters" May Resemble Charter-parties, They Are Non-maritime.*

The respondent has cited authorities which establish that a charter-party is a maritime contract. But the "requisition charters" are not charter-parties. And, even conceding for purpose of argument that a "requisition charter" may be said to resemble a charter-party in some respects, that fact does not confer jurisdiction on admirality.

While the English criteria of admiralty jurisdiction has been discarded in this country since *DeLovio* v. *Boit*, 7 Fed. Cas., 418, and a more liberal rule adopted, this jurisdiction has always remained a strict and limited one.

Courts of Admiralty in this country have jurisdiction only over contracts essentially maritime in their nature. The phrase "essentially maritime" is strictly limited to certain contracts directly and immediately affecting the navigation of a ship or the transportation of goods on the high seas. It may be true that on occasions trial courts have stretched the jurisdiction in doubtful cases to avoid depriving a suitor of relief, but it has never been extended to deprive a suitor of his remedy.

A Court of Admiralty is a court of special jurisdiction and no presumption will be indulged in to extend the scope of its jurisdiction, which must be affirmatively shown.

> "The rule of strict limitation is uniformly recognized and generally applied in the admiralty courts. Instances are numerous of its application and denial of jurisdiction in reference to causes which appear to be maritime in certain aspects, but are not purely maritime in the jurisdictional sense."
>
> *Pacific Surety Co.* v. *Leatham & Smith*, 151 Fed. 440 (C. C. A., 1907).

> "The lines of the jurisdiction of the admiralty are strictly defined and while in the American Courts the jurisdiction has been enlarged from the English rule * * *, so that

> now the test of jurisdiction is whether or not the contract has reference to maritime service or maritime transactions, its scope has, nevertheless, not been further extended, but remains as defined by the Supreme Court in *Insurance Co.* v. *Dunham*, 11 Wall. 1 * * *".
>
> *Pacific Coast S. S. Co.* v. *Ferguson*, 76 Fed. 993, 996 (C. C. A., 9, 1896).
>
> *Richards* v. *Hogarth*, 94 Fed. 684 (D. C. N. J., 1899).
>
> *Plummer* v. *Webb*, 19 Fed. Cas. 891 (No. 11233).

And so, before admiralty can assume jurisdiction over a controversy arising out of contract, it must clearly appear that the agreement falls into one of the recognized classes of maritime contracts.

The rule laid down by this Court in *Vandewater* v. *Mills*, 19 How. 82, definitely marks such a contract as the "requisition charter" as non-maritime. In that case steamship owners had agreed to run vessels between New York and San Francisco and divide the profits. The contract contained many provisions characteristic of charter-parties. It related to ships and their use as such and to commerce on navigable waters, but the court disposed of the claim that such a contract was within the admiralty jurisdiction, as follows:

> "We have examined this case from this point of view, because the libel seems to take it for granted that every breach of contract, where the subject matter is a ship employed in navigating the ocean, gives a privilege or lien on the vessel for the damages consequent thereon, and because it was assumed in the agreement that

if this contract was in the nature of a charter-party, or had some features of a charter-party, the court would extend the maritime lien by analogy or inference for the sake of giving the libelant this remedy, and sustaining our jurisdiction. But we have shown this conclusion is not a correct inference from the premises, and that this lien, being *stricti juris*, will not be extended by construction. It is, moreover, abundantly evident that this contract has none of the features of a charter-party. A charter-party is defined to be a contract by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places. Abb. Ship., 241.

"Now, by this agreement, the libelant has not hired The Yankee Blade, or any portion of the vessel; nor have the master or owners of the ship convenanted to convey any merchandise for the libelant, nor has he agreed to furnish them any. But the agent for The Yankee Blade 'agrees that when The America arrives at Panama, The Yankee Blade shall leave New York conveying passengers and freight,' which were afterwards to be received by The America and transported to San Francisco; and the passage money and freight earned was to be divided between them—25 per cent to The Yankee Blade, and 75 to The America.

"This is nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers between New York and San Francisco, and the mere fact that the transportation is by sea and not by land, will not be sufficient to give the court of admiralty jurisdiction of an action for

> a breach of the contract. It is not one of those to which the peculiar principles or remedies given by the maritime law have any special application, and is the fit subject for the jurisdiction of the common-law courts."

Ward v. *Thompson*, 22 How. 330, is equally decisive. There libelant chartered a boat to respondent who was to *operate* it as a passenger and freight boat and *employ the crew*, one-half of profits to be paid to libelant. The Court said:

> "The articles of agreement containing the contract, which is the subject-matter of this suit, are denominated in the libel a charter-party of the steamboat Detroit to respondent. The answer denies that he had chartered the vessel, and alleges that the writing declared on is a contract of partnership, and not a charter-party. The circuit court agreed with the respondent as to the construction of the contract, and consequently dismissed the bill.
>
> "A court of admiralty takes cognizance of certain questions between part owners, as to the possession and employment of the ship, but will not assume jurisdiction in matters of accounts between them. *The Orleans* v. *Phœbus*, 11 Pet. 175. It is not disputed that a contract of partnership in the earnings of a ship comes within the same category. If the party desires an account, his remedy is in a court of chancery. If his complaint be for a breach of some independent covenant, he should seek his remedy in a court of common law.
>
> "A charter-party is defined to be 'a contract by which a ship, or some principal part thereof, is let to a merchant, for the conveyance of goods

on a determined voyage to one or more places.'

"A contract of partnership is where parties join together their money, goods, labor or skill, for the purpose of trade or gain, and where there is a community of profits.

"The only characteristics of a charter-party to be found in this contract are, that the subject of it is a ship, and that libelants are owners. There is no letting or hiring of the ship to the respondent for a given voyage, to be employed by him for his own profit."

The Ada, 250 Fed. 194 (C. C. A., 2, 1918).
Alberti v. *The Virginia*, 1 Fed. Cas. 306 (No. 141).

The shipowner in the present case did not contribute a ship or agree to do so. Its vessels were taken without the consent of the owners, who merely assented to terms of requisition offered by the Government.

It is respectfully submitted that the so-called "requisition charter" less resembles a true charter-party than the agreements considered in *Vandewater* v. *Mills*, and *Ward* v. *Thompson*, and that it cannot be subject to the limited jurisdiction of admiralty.

The only case cited by respondent which did not involve a true charter party is *United Fruit Co.* v. *Fleet Corporation*, 42 Fed. (2d) 222 (D. C. Mass.). That case did not involve either a requisition charter or a true charter-party. It involved only the breach of an agreement to maintain a vessel engaged in the merchant trade in a seaworthy condition. This covenant was part of an agreement for the operation of a vessel in the merchant service. No requisition and no liqui-

dation of just compensation was involved in that case.

It is submitted that the "requisition charters" are non-maritime and unenforceable under the Suits in Admiralty Act..

II. This action is upon the balance of a current, mutual and running account and hence is a non-maritime cause for which the Suits in Admiralty Act affords no remedy.

In reality, this suit is based not upon the "requisition charters" but upon the balance of an open, current and mutual account between the shipowner and the respondent. This account was made up of sums accruing from time to time to the shipowner as the reasonable compensation for the use of its vessels and various items of revenue becoming due to the United States in connection with the operation of these and other vessels (R., 12, 13).

The exact nature of these accounts is not disclosed by the record before this Court. The record before the Court of Claims discloses that the items constituting the account were of various and divers sorts. No one would deny that many of these items are non-maritime in nature. In the present record it will suffice to refer to items constituting just compensation due to the shipowner and the shipowner's compensation as agent of the United States.

It is settled that the sole jurisdiction of an action upon the balance of an account is at law.

In *Minturn* v. *Maynard,* 17 How. 476, 497, the court said:

> "The libel shows nothing but a demand for a balance of accounts between agent and principal for which an action of assumpsit in a common law court is the proper remedy."
>
> *The Steamer Eclipse,* 135 U. S. 599.
> *Grant* v. *Poillon,* 61 U. S. (20 How.) 162.

Admiralty will not take jurisdiction of an action for an accounting and will only take an accounting where to do so is a mere incident to the relief afforded in an action which is for some other reason within the admiralty jurisdiction.

The Zellah May, 221 Fed. 1016.

Respondent does not refer to *Minturn* v. *Maynard, The Steamer Eclipse* or *Grant* v. *Poillon,* which settle the rule upon this subject. Instead, it cites cases involving the principles of an account stated. But there is no similarity between the effect of an account stated and of a mutual, current and running account.

An account stated does not alter the nature of an indebtedness.

> "It is not, strictly speaking, the statement of new debt but merely the acknowledgment of an old one."
>
> *State* v. *Illinois Central R.,* 246 Ill. 188, 92 N. E. 814;

And the creditor may always disregard the statement of account and maintain his action on the original indebtedness.

Big Four Implement Co. v. *Chesney,* 204 Mo. App. 285, 223 S. W. 944, 945.

And so it is that a statement of account does not alter the nature of a maritime cause and deprive admiralty of jurisdiction. That is the extent to which respondent's cases go. They do not touch upon suits for the balance of current accounts, to which a very different rule applies.

> "It has been uniformly held that distinct and different items of charge, in an open and mutual account, do not constitute separate claims, but that the claim or debt is found in the balance of the account; and that it is the balance only that constitutes the claim of the party to whom it is due."
>
> *Hodge* v. *Manley,* 60 Am. Dec. 254, 25 Vt. 210.

And when a charge has become a part of an open and running account, it cannot be taken out of the account because liability is denied.

F. Berg & Co. v. *Strother,* 207 Mo. App. 45, 230 S. W. 364.

The respondent has also suggested that the claim which is the subject of this suit was excluded from the settlement between the Board and the shipowner and hence did not lose its identity in a general balance but was regarded as a distinct and separate item. But it clearly appears that the items in question became a part of the mutual account long prior to the settlement agreement (R., 10, 11) and the only right which the shipowner ever had was to payment of the balance

of that account. No denial of liability by the United States could separate these items from the account of which they were properly a part (*F. Berg & Co.* v. *Strother, supra*) and the settlement agreement did not purport to do so. The settlement agreement confirmed the existence of the account by payment of a lump sum on account of the disputed balance and reserved the preexisting right of the shipowner to sue for the balance claimed and identified the items constituting the disputed balance.

III. In addition to being non-maritime, this cause is not maintainable under the Suits in Admiralty Act because it does not arise out of the ownership, possession or operation of ships as merchant vessels.

(a) *The Requisition Charters Were Not Incident to the Use of Vessels as "Merchant Vessels."*

The Suits in Admiralty Act subjects the sovereign to liability to suit and therefore must be strictly construed. *Eastern Transportation Co.* v. *United States,* 272 U. S. 675, 686.

Furthermore, the Court of Claims (24 Stats. 505, Ch. 359, U. S. C., Title 28, Sec. 250) is vested with general jurisdiction of claims against the United States. The Suits in Admiralty Act is in derogation of that jurisdiction to the extent that it confers jurisdiction in matters of contract on a court of special and limited powers. For that reason the Suits in Admiralty Act must not be extended beyond its clear terms. *United States* v. *Barnes,* 222 U. S. 513, 520.

The Suits in Admiralty Act not only restricts actions maintainable thereunder to those which are maritime in nature; it also restricts such actions to those connected with ownership or operation of a ship while employed as a "merchant vessel." This limitation excludes not merely non-maritime causes but causes of any nature which are not clearly and directly connected with the activities of ships which are engaged in the merchant service.

The respondent states that the shipowner's vessels were operated for the United States as merchant vessels when the transactions out of which this claim arises took place. This we cannot concede because it is not a fact. It is true that the requisitioned vessels were operated by the shipowner in the carriage of freight and passengers (R., 7), but in October of 1917 these vessels passed into the possession of the United States and were not returned until 1919 (R., 8, 9). The "requisition charters" do provide that the vessels shall not have the status of public ships unless they are in the service of the War or Navy Department (R., 18). But the record does not show whether the ships were or were not in the service of the War or Navy Department.

Furthermore, the Suits in Admiralty Act does not apply to matters connected with the operation of a ship in any governmental service whether in the service of the War or Navy Department or otherwise. The record is devoid of any evidence that any one of the ships was ever used as a merchant vessel by the United States. In truth the Government did use the shipowner's vessels in part in the service of the War and Navy De-

partments. But for all that the record shows, this may or may not be the fact, and unless and until it shall be made to appear by the respondent that this is the fact, it cannot establish that petitioner has any action maintainable under the Suits in Admiralty Act.

But wholly apart from any use to which the vessels might have been devoted, these requisition charters were preliminary and anterior to the use of the vessels by the United States and in no sense identified with, or incidental to, the use of the vessels as merchant ships. None of the vessels acquired character either as public ships or merchant ships, by virtue of the seizure of the "requisition charters." Thereby, the ships were merely placed at the disposal of the United States and appropriate provision made to fix the owner's compensation. If the Government should have thereafter devoted them to a merchant use, this was the exercise of an election with which the shipowner was not concerned and over which it had no control. If the vessels did thereafter acquire character as merchant vessels for a portion of the time or continuously, such character was acquired entirely independent of the seizure or the "requisition charters," neither of which can therefore be said to be incidental to the operation of the vessels as merchant ships.

If the United States having seized the ships and arranged for just compensation devoted any of them to commercial uses, then, such liabilities as were incidental to that use and such liabilities only would fall within the Suits in Admiralty Act. It was by no means, a natural or probable consequence of the execution of a "requisition charter" that the subject thereof

would be employed in the merchant trade. The only legal consequence or result of the "requisition charter" was to provide the means of fixing compensation, whatever the use to which the Government might devote the vessel. The United States concedes that, if in fact the vessels were not used as merchant vessels, this cause does not come under the Suits in Admiralty Act. Yet the United States was not obligated to do so and, if in fact it did so after the seizure, its election did not alter the nature of the agreements which had already been made.

Indeed, it is difficult to conceive how any charter between an owner of a vessel and the United States could furnish the foundation for a cause enforceable under the Suits in Admiralty Act. The means whereby a vessel is placed at the unrestricted command and disposition of the government does not arise out of the ownership, possession or operation of a ship as a merchant vessel by the United States. It is for this reason that it has been said that the Suits in Admiralty Act applies only to suits against the United States by third parties dealing with the ship or suffering from her faults. It is not based, as the respondent suggests, upon the claim that the Act was solely designed to relieve ships of the embarrassment of *in rem* proceedings.

In *N. S. Byonnes & Son Dampskibsrederi Aktieselskab* v. *United States,* 298 Fed. 123, 124 (S. D. N. Y.), Judge Hand in discussing the rights of an owner who had chartered his vessel to the United States stated the same distinction in somewhat different language:

> "It was a remedial act to those who should be injured by the dealings of ships owned or operated by or for the United States, third persons whom the sovereign immunity of the United States deprived of any remedy. These did not include owners who had a contract on which they might sue in the Court of Claims or under the Tucker Act. I need not be so absolute as to say that an alternative remedy would bar relief under this statute, but I should, I think go far enough to hold that it runs only for those who may be regarded as either treating with the ship or suffering from her faults. Owners are not in either class."

The "requisition charters" were between the United States and the shipowner and did not arise out of ownership, possession or operation of ships as merchant vessels by or for the government. The requisition charters did not arise out of the possession of the Government, but its possession did arise out of the seizure. The operation was subsequent to the seizure and the contracts, and whether or not the operation arose out of the seizure or the contracts, neither the seizure nor the contracts arose out of the operation of merchant vessels.

(b) *The Suits in Admiralty Act Does Not Apply To This Cause Because it is Incident To the Exercise of a Governmental Function.*

The Suits in Admiralty Act was solely concerned with liabilities of the United States incurred in the course of the employment of ships as merchant vessels. It did not deal with the exercise of any govern-

mental function. A series of Statutes was adopted between 1917 and 1920 which dealt exclusively with the exercise of governmental functions relating to shipping including the requisition of ships and the determination and payment of just compensation. Section 2 of the Merchant Marine Act of 1920 was such a statute (41 Stats. 988, *infra* p. 56). The requisition of the shipowner's vessels and the "requisition charters" are governed solely by the latter group of statutes and are wholly foreign to the subject of the Suits in Admiralty Act:

The Suits in Admiralty Act Did Not Apply to Causes Incident to the Exercise of Governmental Functions.

The Shipping Act of 1916 (39 Stats. 728) authorized the United States through corporate agency to operate and maintain merchant ships (Sec. 13) and to charter, lease and sell ships to citizens (Sec. 7). It also subjected (Sec. 9) all vessels in which the United States had any interest to proceedings *in rem* to answer for any obligation or fault of the ship so long as it was operated solely as a merchant vessel.

The Lake Monroe, 250 U. S. 246.

This was the unsatisfactory condition of the law until the Suits in Admiralty Act was adopted. Its purpose was to relieve the United States of the inconvenience resulting from the seizure of its vessels by substituting for a proceeding *in rem* one *in personam* and also to authorize a libel *in personam* where the United States "was the owner of an offending ves-

sel, like that of a private owner, * * * in cases where there was no basis for an action *in rem.*"

United States v. *Rosenberg Bros.*, 276 U. S. 202, 212.

This act dealt exclusively with liabilities which were peculiar to the operation of a merchant vessel, for it provided a remedy only in those cases where if the vessel involved "were privately owned or operated * * * a proceeding in admiralty could be maintained at the time of the commencement of the action * * *."

Its application was specifically restricted to activities of the United States as the owner or operator of ships in a mercantile capacity thereby excluding activities of the United States in the exercise of governmental functions.

The whole tenor of the Act is in keeping with this limitation. It is provided, Section 3—

> "That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties."

By Section 6 there is conferred on the United States the benefit of all exemptions and limitations of liability accorded by law to private persons.

Obviously the principles of law applicable in transactions between private parties are wholly inapplicable in controversies arising out of the exercise by the government of its functions and powers as sovereign.

Section 2 provides that an action may be maintained only "provided that such vessel is employed as a

merchant vessel * * *." Thus the remedy relates only to acts or liabilities peculiar and incidental to the actual operation of a ship as a merchant vessel.

The Emergency Shipping Laws and the Merchant Marine Act of 1920 *Govern All Actions Arising Out of the Emergency Shipping Powers of the President.*

In sharp contrast with statutes relating to activities of vessels of the United States engaged in the merchant service was the emergency shipping legislation enacted during the war with Germany to place the shipping facilities of the country at the disposition of the Government.

Such an emergency act was the Act of June 15, 1917, which appropriated funds for various war purposes and empowered the President to purchase ships and materials, to requisition contracts for the building of ships, to take over possession of shipbuilding plants, and to "purchase, requisition or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in the process of construction * * *" (*Infra*, p. 51).

It also directed the President to fix just compensation for the use of any requisitioned ship and, should the amount so determined be unsatisfactory to the owner, to pay 75 per cent of the amount so fixed, reserving to the shipowner the right to proceed under the Tucker Act to recover the balance claimed. The act further directed that all ships requisitioned should be managed, operated and disposed of as the President might direct.

This Act, placing at the disposal of the United States the country's shipping facilities, related to a function which was a strictly governmental one and was one of a series of similar statutes vesting in the President extraordinary powers over the nation's resources, including its shipping facilities.

In 1920, when hostilities had ceased and the necessity of exercising these powers had ended, the Merchant Marine Act of 1920 (40 Stats. 988) was adopted. This act was pending in Congress when the Suits in Admiralty Act was adopted. It repealed (Sec. 2) the provisions of the emergency legislation which had empowered the President to requisition, seize, acquire by purchase or contract, and regulate the shipping facilities of the country. It also provided for liquidation of liabilities of the United States growing out of the exercise of these governmental powers under the acts repealed, but not the liabilities of the United States incidental to the operation of ships as merchant vessels since this had already been provided for in the Suits in Admiralty Act.

The Merchant Marine Act of 1920 directed the Board to assume and carry out all agreements lawfully entered into under the emergency legislation repealed (Sec. 2(*b*) 1.) It also (Sec. 2(*b*) 2) preserved all existing remedies resulting from any act or agreement arising out of any action taken under the emergency laws repealed and provided a remedy against the United States. Section 2 (*c*) directed the Board to settle and liquidate all matters incident to the exercise of any of the President's powers under the emergency laws repealed, vested the Board for this purpose with

the power and duty of the President to determine and pay just compensation and afforded to every person dissatisfied with any decision of the Board a remedy against the United States.

The same Congress which had, by enacting the Suits in Admiralty Act, provided a complete system for the settlement of controversies incidental to the operation of vessels of the United States for commercial purposes, provided, by enacting the Merchant Marine Act of 1920, a complete system for the settlement of controversies incidental to the exercises of the powers conferred on the President by the emergency shipping laws. The Merchant Marine Act of 1920 did not exclude maritime causes because it was the purpose of that Statute to provide a remedy for all causes incidental to the exercise of emergency powers whether they might be civil or maritime, at law or in equity. The Suits in Admirality Act on the other hand had provided a remedy for maritime causes incident, not to the exercise of governmental functions, but to commercial enterprises only.

This purpose of Congress is confirmed by the fact that the Suits in Admirality Act vested the Board with power to compromise and settle claims upon which suit would lie thereunder (Sec. 9). The Merchant Marine Act likewise conferred on the Board power to settle all claims arising under the emergency shipping legislation (Sec. 2*c*). Had the power to compromise and settle claims under the earlier act included maritime claims incident to the exercise of emergency power Congress would not have had occasion to confer that power under the later Act.

That Congress did not believe that the Suits in Admiralty Act related to claims arising out of the exercise of the governmental functions described in the Emergency Shipping Law, appeared in the explanation made when Section 2 of the Merchant Marine Act of 1920 was reported and explained by the House Committee on Marine and Fisheries as follows:

> "This bill does not delegate to the Shipping Board any new powers. It does, however, give the board full power to adjust, settle and liquidate all matters arising out of or incident to the administration of those emergency laws and to wind up the business and dispose of the property and settle the claims which have grown out of the administration of the law by the Shipping Board and the Emergency Fleet Corporation under the powers delegated to them by the President of the United States under the acts repealed by Sec. 1 of the bill."
>
> *Congressional Record*, Vol. 58, Part 8, p. 7998.

While the scope of Section 2 of the Merchant Marine Act of 1920 has never been defined, this Court has said that—

> "The words of Subdivision *b* (2) saving all existing remedies which 'may be exercised and enforced in like manner, subject to the provisions of Subdivision (*c*)' must be taken to preserve the old remedies and to give the new one if the matter is one which the board is authorized to settle by (*c*)."
>
> *United States* v. *Harwood*, 281 U. S. 519, 527.

And, again, referring to the matters which the Board is authorized to settle by Section 2*c*, this Court said in *United States* v. *McCarl*, 275 U. S. 1, 11:

> "If, on the other hand, the contracts were made and canceled by the Fleet Corporation under the power delegated by the President, the settlement and adjustment of the claim falls clearly within the powers conferred by Section 2 (*c*) upon the Shipping Board."

The respondent suggests that the remedy conferred by Section 2 (*c*) relates solely to the power of the President to fix just compensation. But the section is clearly broader in its scope.

After directing the Board to settle, adjust and liquidate all matters incident to the exercise of the President's powers and duties under the emergency shipping laws, Section 2 (*c*) continues that "for this purpose" (that is, to settle all matters incident to the exercise of any such power or duty of the President), "the Board * * * shall have and exercise any of *such* powers and duties relating to the determination and payment of just compensation." Congress contemplated that the President had powers and duties other than the determination and payment of just compensation but vested the latter powers in the Board to the end that it would be clothed with all authority needed to adjust all matters. These provisions were followed with a proviso which empowered "*any* person dissatisfied with *any* decision of the Board" to sue the United States just as he might have done had the decision been made by the President under one of the repealed

acts. This remedy was not restricted to the question of just compensation but referred to any decision of the Board and the power to determine and pay just compensation was conferred on the Board merely to enable it to more effectively "settle all matters" growing out of any power or duty of the President under an act repealed.

The emergency powers of the President included the power to requisition ships, the power to pay as well as to preliminarily fix just compensation and the power to determine how vessels acquired by the United States should be operated, managed or disposed of.

A decision made by the President in the exercise of any such power was as much a decision as a decision determining just compensation. Each decision of the President was as much subject to judicial review as another. It was the Board's duty to consider and decide all controversies and it was a dissatisfied claimant's right to sue after any such decision had been made.

This construction is the only reasonable one. It alone harmonizes with the expressed desire of Congress to empower the Board to adjust, settle and liquidate all matters incident to the administration of the emergency laws and to settle the claims which grew out of the administration of the law by the Shipping Board and the Emergency Fleet Corporation under the powers delegated to them by the President of the United States by the acts repealed by Section 2. *Congressional Record,* Vol. 58, Part 8, p. 7998.

Thus the Suits in Admiralty Act and Section 2 of the Merchant Marine Act of 1920 together provide

remedies for all causes arising out of the Government's shipping activities, the former act embracing only those claims which arise out of the Government's participation in the shipping business and the latter act embracing all claims incident to the exercise of the governmental functions referred to in the emergency shipping legislation.

This Cause Is Incident to the Exercise of An Emergency Power of the President and Therefore Lies Under the Merchant Marine Act of 1920 and Not Under the Suits in Admiralty Act.

The "requisition charters" were not entered into in the operation of ships as merchant vessels. The President had the power to seize vessels and to enter into agreements with reference to just compensation for the use thereof solely by virtue of the powers conferred by the emergency shipping laws. Whether the "requisition charters" confirmed the requisitions and liquidated just compensation, as we assert, or superseded the requisition and right to compensation, as respondent contends, these agreements all arose, not out of the operation of the government's vessels in commercial pursuits, but out of the exercise of governmental functions under the emergency shipping laws.

It was the duty of the Board, therefore, to adjust and settle the claim and the shipowner's right, under the Merchant Marine Act of 1920, if dissatisfied with the decision of the Board, to pursue the remedy provided thereby.

Indeed, even if the remedy afforded by the Merchant Marine Act of 1920 were restricted as the respondent

has suggested to the matter of just compensation it would afford a remedy to the shipowner in this case. The so-called "requisition charters" grew immediately out of the exercise by the President of his power to fix just compensation. The requisition charter but defined the compensation determined by the President and constituted acceptance of that compensation by the shipowner. This action is not the less one to recover the just compensation because the amount is to be ascertained by reference to a written agreement. Though the amount of just compensation, as respondent states, depends on "what the parties intended by the agreement" the subject of this action is the just compensation so to be determined.

Furthermore, Section 2 (*c*) specifically refers to the power and duty of the President not only for determination, but also for *payment* of just compensation when fixed. This action is one to compel *payment* of just compensation to be determined by the agreements. The payment of just compensation is a duty specifically referred to in Section 2 (*c*), and enforceable thereunder.

It has been held that a dispute under a requisition charter is one which the Board is authorized to decide under Section 2 (*c*) of the Merchant Marine Act of 1920.

Luckenbach Steamship Co. v. *United States,* 42 Fed. (2d) 156 (C. C. A., 2, 1930).

Luckenbach Steamship Co. v. *United States,* 299 Fed. 876 (S. D. N. Y., 1924).

If so, such a dispute is one to be adjudicated under the provisions of the Merchant Marine Act of 1920 (*United States* v. *Harwood*, 281 U. S. 519, 527) and is not one embraced in the Suits in Admiralty Act.

With the present claim enforceable under the Merchant Marine Act of 1920, may be contrasted the claims involved in *Johnson* v. *United States*. In the Johnson case vessels of the United States, acquired in some manner not stated and not important for the purposes of the case, had been devoted to the merchant service. The complaints were based upon contracts of affreightment and personal injuries to seamen, all incidental to the operation of vessels while they were so devoted. Thus, they were claims peculiar to the operation of ships as merchant vessels and unrelated to the exercise by the President of any of his emergency powers. The Johnson case illustrates one category and the case at bar illustrates the other.

IV. The Government's Construction of the Suits in Admiralty Act would lead to confusion and uncertainty.

The claim that this suit lies under the Suits in Admiralty Act would lead to absurdities which it cannot be believed Congress ever intended. If the shifting uses to which a vessel publicly owned may be put are to govern the rights of the parties under pre-existing contracts, the shipowner will be in perpetual doubt and difficulty as to the forum and the remedy available for his protection and will be subjected to the embarrassment of splitting his causes of action to suit the exigencies of the case. Thus, what would properly be

regarded as a single cause of action may be artificially divided into a number limited only by the number of times that the United States might change the use to which the ship is to be devoted.

The claims to which the Suits in Admiralty Act refers, are solely those arising while the vessels are employed as merchant vessels. The record does not show that the shipowner's vessels were ever used as merchant vessels. It does not appear how they were used. But for the sake of argument let us assume that these vessels were used, in part at least, as merchant vessels.

Under the so-called requisition charters the owner's vessels remained completely at the disposal of the United States. They specifically provided that the requisitioned vessels might be engaged in the military or naval service, in which event the vessel would have the status of a public ship. The United States was free to charter the vessel to a third person if it desired and if it did so, no claim arising during the period of the charter would be enforceable under the Suits in Admiralty Act. *N. S. Byonnes & Sons Damskibsrederi Aktieselskab* v. *United States*, 298 Fed. 123 (S. D. N. Y.). The ship was always subject to the order and directions of the United States, which was free to employ the ship in any national service. Throughout the period of the requisition, for whatever purpose the ship was used, whether as a public ship or as a merchant ship, or for charter to others, the so-called requisition charter continued in full force and effect.

If the Government's contention be correct, it would be incumbent upon the owner to follow each vessel

throughout its activities and to determine, at its peril, whether compensation under the requisition charter had accrued while the vessel was used as a merchant ship, in which case suit must have been filed in the District Court within two years, or while the vessel was used for any other purpose, in which case the suit must have been filed in the Court of Claims or the District Court under the Tucker Act but a period of six years would be allowed within which to institute action. Not only would the owner be required to determine this question at its peril; it would also be required to segregate and allocate compensation and charges proportionately to the periods during which a ship was and was not employed as a merchant ship. Thus, advances for which the shipowner would be entitled to reimbursement (R., 19, 22) would necessarily be allocated between such times as the vessel was actually engaged as a merchant ship and other times when it was not so engaged. And how would such an allocation be made? If it could be made, the result would follow that, as to a portion of such a claim, suit must be instituted in one court with one limitation and as to the remainder in another court with another limitation.

The decision in *Johnson* v. *United States* was principally based upon the policy of establishing substantial uniformity as to venue, service of process, rules of decision and procedure, rate of interest and period of limitation, but if the respondent's construction of the Suits in Admiralty Act were adopted, that policy would be entirely defeated so that confusion and un-

certainty would prevail, with reference, not only to the forum and the period of limitation, but also to the substantial rights of the parties.

It is settled that a claim such as the petitioner's in this case is not one which bears interest because it is a claim for just compensation defined by contract.

New York & Porto Rico Steamship Co. v. *United States*, 29 Fed. (2d) 1014;

Atlantic Refining Co. v. *United States*, 69 Ct. Cl. 713 (certiorari denied, 282 U. S. 859).

But the petitioner would be entitled to interest at 4 per cent if the suit were one under the Suits in Admiralty Act. (Section 3, *infra*, p. 54.)

United States v. *Certain Freights*, 4 Fed. (2d) 132 (D. C. Mass.);

Emergency Fleet Corporation v. *Florida Grain and Elevator Co.*, 20 Fed. (2d) 583, 586 (C. C. A. 5, 1927);

Smith v. *Emergency Fleet Corporation*, 26 Fed. (2d) 337, 339.

To the extent that the shipowner's right would be enforceable in the Court of Claims or the District Court under the Tucker Act, it would not be entitled to costs against the United States (19 Stats. 344 C. 105, U. S. C., Title 28, Sec. 283). But to the extent that the shipowner's rights would be enforceable under the Suits in Admiralty Act the shipowner would be entitled to costs.

James Shewan and Sons, Inc. v. *United States*, 267 U. S. 86.

The rights of the shipowner are based upon the seizure and are defined in the "requisition charter" and the rights of the parties must be determined by reference to that contract. Nevertheless, the Government asserts that the forum, the period of limitation and the rules of legal procedure are dependent, not upon the provisions of the agreement, but upon the whim of the Board in the use to which the vessel might from time to time have been devoted. Upon the respondent's theory, the "requisition charter" would entitle the owner to interest and costs in a suit for compensation which accrued while the vessel might be in the merchant service, but the same "requisition charter" would not entitle the owner to interest or costs in a suit for such portion of the just compensation or hire as accrued while the vessel might be in the governmental service. In other words, the shipowner's rights would be dependent, not upon the contract, but solely upon the use to which the vessel might be devoted in the exclusive discretion of the Board and upon the Board's whim and caprice.

This construction would not lead to uniformity but to confusion, inconsistency and inconvenience and nothing in the language of the Suits in Admiralty Act can be found to justify it.

Where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain. *United States* v. *Fisher*, 2 Cranch, 358, 386.

Reasonably construed the Suits in Admiralty Act applies only to those maritime causes which are peculiar to and connected solely with the employment

of vessels as merchant ships and, so construed, the Act affords no remedy to enforce a "requisition charter."

V. The jurisdiction at law of claims upon "requisition charters" is supported by a long course of decisions.

Although the Suits in Admiralty Act was adopted in 1920 and numerous claims have been pressed against the United States since that time upon these requisition charters, the United States now, when but few such matters remain to be settled, urges for the first time that such an action as this is governed by the Suits in Admiralty Act. Claims in connection with which "requisition charters" have been made have heretofore frequently been heard and determined by the Court of Claims or by the District Court under the provisions of the Tucker Act.

Huron Navigation Corp. v. *United States,* 60 Ct. Cls., 770 (1925) (Appeal dismissed, 273 U. S. 777);

Atlantic Refining Co. v. *United States,* 69 Ct. Cls., 713 (1930). (Certiorari denied, 282 U. S. 859);

Olympia Shipping Corporation v. *United States,* 71 Ct. Cl., 251 (1930);

Ore Steamship Co. v. *United States,* No. D-660, Ct. Cls. (unreported);

Standard Oil v. *United States,* 61 Ct. Cls., 951 (1926);

Standard Transportation Co. v. *United States,* 61 Ct. Cls., 906 (1926).

In the District Court the very question raised in this case by the United States upon the merits was heard

under the Tucker Act and determined adversely to the United States. *New York & Porto Rico Steamship Co.* v. *United States,* 29 Fed. (2d) 1013, and the decree in that case was affirmed in the Circuit Court of Appeals, 29 Fed. (2d) 1014 (C. C. A., 2, 1428).

It is difficult to believe that each of the many judgments rendered under the Tucker Act in connection with the so-called requisition charters is void. It was the duty of the court in each of these cases to satisfy itself of its jurisdiction. In the light of that duty the authorities abundantly and numerously support the contention of the petitioner.

It could not have occurred to the respondent until January 13, 1930, when its motion to dismiss was filed in this proceeding, that any question as to the jurisdiction of the Court of Claims existed. The petition in this action was filed on April 6, 1927, within six months after the claim of the shipowner had accrued (R., 13). Had it then been urged that the shipowners' remedy was solely under the Suits in Admiralty Act the shipowner would have had ample time to protect itself by the institution of proceedings in admiralty, but when the motion to dismiss was filed, the two-year limitation prescribed by the Suits in Admiralty Act had elapsed. We cannot believe that respondent would have deliberately awaited the expiration of the limitation contained in the Suits in Admiralty Act before urging at this Court that the proceedings should have been instituted in the District Court in Admiralty, thereby depriving the shipowner, if the government should succeed upon its motion, of any remedy whatever in connection with a matter where the liability of

the respondent is now settled. *The Brazos,* 29 Fed. (2d) 1013, affirmed in 29 Fed. (2d) 1014.

We submit that the Suits in Admiralty Act affords the shipowner no remedy whatever and that jurisdiction of the cause is in the Court of Claims under the Tucker Act for the following reasons:

1. The "requisition charters" are non-maritime;

2. The action is one upon the balance of an account and is properly brought at law *in assumpsit;*

3. The "requisition charters" do not arise out of the ownership, possession or operation of vessels as merchant ships;

4. The jurisdiction of this cause at law is settled by judicial precedent.

Respectfully submitted,

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APPENDIX.

The Act of March 3, 1887, c. 359, 24 Stat. 505 (U. S. C. Title 28, Sec. 250) provides in part as follows (as does also Section 145 of the Judicial Code, 36 Stat. 1087, 1136):

> * * * That the Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable; * * *

Section 2 of the 1887 Act conferred concurrent jurisdiction upon the district courts and circuit courts, on claims of certain limited amounts.

The Twentieth Clause of Section 24 of the Act of March 3, 1911, c. 231, 36 Stat. 1087, 1093 (U. S. C. Title 28, Sec. 41 (20)) confers upon the district courts jurisdiction concurrent with the Court of Claims in respect of claims not exceeding ten thousand dollars.

Section 154 of the Judicial Code, c. 231, 36 Stat. 1087, 1138 (U. S. C., Title 28, Sec. 260), provides:

> No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any

other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

The Urgent Deficiencies Act of June 15, 1917, c. 29, 40 Stat. 182, 183, provided in part as follows:

Emergency Shipping Fund.

1. The President is hereby authorized and empowered, within the limits of the amounts herein authorized—(*e*) to purchase, requisition or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

2. Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or materials so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material, or plant of such person or any part thereof without taking possession of the entire plant and may use the same at such times and in such manner as he may consider necessary or expedient.

3. Whenever the United States shall cancel, modify, suspend, or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

4. The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time.

Provided, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct.

The Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525, 526, 527, 528 (U. S. C., Title 46, Secs. 741, 742, 745, 749), provides in part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled, That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock, or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the District Court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States

or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

SEC. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction.

SEC. 4. That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act.

SEC. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

SEC. 7. That if any vessel or cargo within the purview of sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States, or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit.

SEC. 9. That the Secretary of any department of the Government of the United States, or the United States Shipping Board, or the board of trustees of such corporation, having control of the possession or operation of any merchant vessel are, and each hereby is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of Sections 2, 4, 7, and 10 of this Act.

The Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 998, 989 (U. S. C. Title 46, Sec. 862) provides in part:

Sec. 2. (*a*) That the following Acts and parts of Acts are hereby repealed, subject to the limitations and exceptions hereinafter, in this Act, provided:

(1) The emergency shipping fund provisions of the Act entitled "An Act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes," approved June 15, 1917, as amended by the Act entitled "An Act to amend the emergency shipping fund provisions of the Urgent Deficiency Appropriation Act, approved June 15, 1917, so as to empower the President and his designated agents to take over certain transportation systems for the transportation of shipyard and plant employees, and for other purposes," approved April 22, 1918, and as further amended by the Act entitled "An Act making appropriation to supply deficiencies in appropriations for the fiscal year ending June 30, 1919, and prior fiscal years, on account of war expenses, and for other purposes," approved November 4, 1918.

(2) Section 3 of the such Act of April 22, 1918;

(3) The paragraphs numbered 2 and 3 under the heading "Emergency shipping fund" in such Act of November 4, 1918; and

(4) The Act entitled "An Act to confer on the President power to prescribe charter rates and freight rates and to requisition vessels, and for other purposses," approved July 18, 1918.

(5) Sections 5, 7, and 8, Shipping Act, 1916.

(*b*) The repeal of such Acts or parts of Acts is subject to the following limitations:

(1) All contracts or agreements lawfully entered into before the passage of this act under any such act or part of act shall be assumed and carried out by the United States Shipping Board, hereinafter called "the board."

(2) All rights, interests, or remedies accruing or to accrue as a result of any such contract or agreement or of any action taken in pursuance of any such act or parts of acts shall be in all respects as valid, and may be exercised and enforced in like manner, subject to the provisions of subdivision (*c*) of this section, as if this Act had not been passed.

(3) The repeal shall not have the effect of extinguishing any penalty incurred under such Acts or parts of Acts, but such Acts or parts of Acts shall remain in force for the purpose of sustaining a prosecution for enforcement of the penalty therein provided for the violation thereof.

(4) The board shall have full power and authority to complete or conclude any construction work begun in accordance with the provisions of such Acts or parts of Acts if, in the opinion of the board, the completion or conclusion thereof is for the best interests of the United States.

(*c*) As soon as practicable after the passage of this Act the board shall adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such Act or parts of Acts; and for this purpose the board, instead of the President, shall have and

exercise any of such powers and duties relating to the determination and payment of just compensation: *Provided*, That any person dissatisfied *with any decision* of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed.